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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

David Allen Harbour,

Defendant.

Case No. 2:19-cr-00898-DLR (DMF)

**DEFENDANT DAVID A.
HARBOUR'S PROPOSED JURY
INSTRUCTIONS GOVERNMENT
REFUSED TO LIST**

David Allen Harbour (Defendant) submits the following jury instructions. Defendant notes that the Court ordered joint instructions, but the government would not add on instructions lacking authority, giving rise to the need to file this document before the January 4th deadline at 5:00 pm. The date by which jury instructions and objections were to have been submitted, per the latest scheduling order was January 9, 2023. On January 3, 2023, the Court informed the Parties that the jury instructions and objections now would have to be submitted by 5 PM on January 4, 2023. The 5-day shortening of this deadline, on one day's notice, has made it impossible for the Defense to submit authority for this proposed instruction by the new deadline, but the defense will do so as

1 quickly as it is able, on an ongoing and continuing basis, as the hours and days progress.
2 Defendant will supplement the below instructions with the accompanying authority as
3 soon as possible.
4

5 **Documents as Controlling:**

6 In this case, every person who either loaned money or invested money did so
7 through a set of written documents. You are instructed that, notwithstanding how the
8 lawyers may have characterized the persons who loaned money to, or, alternatively,
9 invested money with Defendant or his entities, whether that person was a lender or an
10 investor is determined by the documents signed by the parties and not by the
11 characterization given to the transaction by the lawyers.
12

13 Authority:
14

15 **Role of Lenders or Investors Own Counsel:**

16 You have heard evidence that certain lenders and investors used their own counsel
17 to draft in whole or to modify in part the documents used to define the agreements being
18 reached with Defendant or his entities. A lender or investor who engages counsel to draft
19 or modify transactional documents cannot blame the Defendant for that which his or her
20 own counsel authorized Defendant to do. She or he can blame his or her own counsel.
21

22 Authority:
23

24 **Affirmative Misrepresentation as a Basis for Fraud:**

25 If a borrower fills out a loan application in connection with seeking to obtain a
26 loan, the borrower must scrupulously, honestly, and fully answer the questions that have
27
28

1 asked and provide any and all documentation that has been required by the lender. A
 2 willful failure to do so may constitute a fraud by material misstatement.

3 Authority:

4
 5 **Drafting of Pujanza Amended and Restated Operating Agreement:**

6 You have heard evidence unrebutted by the government that Mark Burg's own
 7 counsel received a draft Pujanza Operating Agreement from Defendant and that counsel
 8 redrafted the Operating Agreement to permit the fund manager, who was the Defendant,
 9 to borrow money from Pujanza. You are therefore instructed that, if the Defendant did no
 10 more than what Mr. Burg's counsel had authorized the fund manager to do, no diversion
 11 of any of Mr. Burg's funds had occurred. And, in this regard, you are reminded, again,
 12 that all money received into a company is fungible with all other money in the
 13 company.
 14

15 Authority:

16
 17 **Advice of Counsel – Tax Counts Only:**

18 You have heard evidence that, with respect to the tax charges, Defendant was
 19 represented by an attorney, specifically Tax Specialist named Jack Beaver. You are
 20 instructed that . . . [add usual advice of counsel language]
 21

22 Authority:

23
 24 **Property Available to the Internal Revenue Service to Satisfy Lien:**

25 You have heard evidence that at the times of the accusations made in the
 26 Indictment, the amount owed to the I.R.S. never exceeded \$169,000. If you believe that
 27 on the dates alleged in the Indictment, the Defendant had disclosed to the I.R.S. sufficient
 28

1 assets that, had the IRS seized or levied upon those disclosed assets, it would have been
2 sufficient to satisfy the outstanding taxes then and there due and owing, then government
3 cannot prove that there has been a willful evasion of taxes and you must acquit the
4 Defendant. Whether the government has proven that the Defendant willfully failed to
5 disclose sufficient assets for the IRS to have obtained those assets is a question of fact for
6 you to determine. However, if sufficient assets had been disclosed and the IRS chose not
7 to seize those assets or levy upon them to satisfy the then and the tax then and there due
8 and owing, that is not the Defendant's fault and the IRS' failure to exercise its collection
9 ability is its own fault.
10

11 Authority:

12
13 **Interpretation That Points to Defendant Being Not Guilty:**
14

15 If the evidence permits two reasonable interpretations, one of which points to the
16 Defendant's guilt and the other to the Defendant being not guilty, you must adopt the
17 interpretation that points to the Defendant being not guilty and reject that interpretation
18 that points to his guilt.
19

20 If, on the other hand, one interpretation of this evidence appears to you to be
21 reasonable and the other interpretation is unreasonable, you must accept the reasonable
22 interpretation and reject the unreasonable.

23 Authority:

24
25 **Fraud as Determined When Conduct is Engaged In:**

26 Whether or not the Defendant willfully intended to defraud a victim is determined
27 as of the time the Defendant allegedly devised the scheme and artifice to defraud. In
28

1 other words, to find the Defendant guilty of wire fraud or mail fraud, you must find
2 beyond a reasonable doubt that, at the time that the Defendant received money or
3 property from the alleged victim, he intended to defraud the victim of the money or
4 property.
5

6 Future events that may have caused the Defendant to not be able to repay loaned
7 money loaned to the Defendant are not badges of fraud, they are badges of other
8 supervening events and while they may leave the Defendant indebted to the alleged
9 victim, the failure to repay the alleged victim is not evidence of a crime.
10

11 To find the Defendant guilty of wire and/or mail fraud, along with everything else
12 you must find, it is required that you find, beyond a reasonable doubt, that when the
13 Defendant received the money from the alleged victim, he never intended to repay the
14 money that he had received.
15

16 Authority:

17 **Failure to Repay a Debt:**

18 It is not disputed that the Defendant borrowed money from certain lenders in this
19 case. The mere failure to repay a lender according to the terms of a promissory note does
20 not constitute a crime, because, if it did, every person who failed to repay a loan
21 according to its terms would be deemed guilty of fraudulent conduct and/or theft.
22

23 Authority:

24 **Bank Fraud – Receipt and Materiality:**

25 Defendant is charged with bank fraud in Count 28. In order for an instrument to
26 be deemed material, in connection with an alleged bank fraud, it must have been received
27
28

1 by the alleged victim bank, the victim must be included in the types of institutions
 2 described under the applicable statute, and the document must have been material to the
 3 decision of the bank to have loaned the money that is the subject of Count 28.

4
 5 In this case there is no evidence that an allegedly false gift letter in the amount of
 6 approximately \$240,000 was ever received by Equitable Home Mortgage and, as a
 7 consequence, you may not find Defendant guilty of bank fraud based upon the
 8 aforementioned gift letter.

9
 10 Authority:

11 **Negative Inference Against Government from Failure to Produce Evidence:**

12 In this case, the government has been in a position to have recorded every single
 13 communication made by the Defendant to his wife since December 2021.

14
 15 The government has also alleged that certain communications were made in
 16 January and February, 2022 by Defendant's wife to a government witness, Bart Shea, that
 17 were allegedly received by her from the Defendant to be passed along to Bart Shea.

18 The government has never produced a recorded communication between the
 19 Defendant and his wife in which such a conversation was recorded.

20
 21 The failure of the government to produce the recorded conversation entitles you,
 22 the jury, to determine that such a communication never occurred.

23 Authority:

24
 25 RESPECTFULLY SUBMITTED this 4th day of January 2023.

26 CHRISTIAN DICHTER & SLUGA, P.C.

27 By: /s/ Stephen M. Dichter

28 Stephen M. Dichter

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2023 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and for transmittal of Notice of Electronic Filing to the following CM/ECF registrants:

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/s/ Yvonne Canez